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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

UNITED MINE WORKERS OF AMERICA, AFL-CIO,
an unincorporated association,
Petitioner,

v.

PEABODY COAL COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Circuit erred in holding, contrary to the Second and Third Circuits, that actions under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.*, should be governed by the six-month statute of limitations for filing unfair labor practice charges under the National Labor Relations Act, 29 U.S.C. § 160(b), rather than by the most analogous state limitations period.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner United Mine Workers of America, AFL-CIO ("UMWA"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals below is published at 38 F.3d 850, and attached herein at Appendix ("App.") 1a-14a. The Court's denial of the UMWA's timely Petition for Rehearing and Suggestion for Rehearing En Banc, is reported at 1994 U.S. App. LEXIS 36109 and reprinted at App. 16a. The unreported Order of the District Court granting Peabody's Motion for Summary Judgment is reprinted at App. 15a.

JURISDICTION

The Court of Appeals entered its judgment on October 31, 1994, and the UMWA's timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on December 14, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(*1*). Jurisdiction in the District Court was proper under 29 U.S.C. § 2104 (a)(5).

STATUTES INVOLVED

The issue presented involves two federal statutes: the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. § 2101 *et seq.*, and the statute of limitations provided in Section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b). The applicable provisions of both statutes are reprinted in the Appendix at 17a-18a and 19a *et seq.*, respectively.

STATEMENT OF THE CASE

The UMWA is a labor organization representing Peabody's employees at numerous coal mining locations throughout the United States. Peabody operates a mine in Greenville, Kentucky, known as the River Queen Mine, which employed approximately one hundred and fifty employees prior to the events in question.

On June 5, 1991, Peabody announced its intention to permanently lay off approximately one hundred and forty (140) employees, or nearly all of those employed at River Queen. Five days later, Peabody began laying off employees, terminating one group on June 10, 1991, and a second group on June 28, 1991, for a total of eighty-two workers. Neither the Union nor the employees were provided the requisite sixty days notice of the layoffs as required by the WARN Act, 29 U.S.C. § 2102(a) (App. 19a).

On May 1, 1992, the UMWA filed suit on behalf of the affected employees as authorized by WARN, 29 U.S.C.

§ 2104(a)(5), alleging that the Company had engaged in a mass lay off or mine closing without first providing notice to the affected employees or their representative, the UMWA. Congress enacted the Worker Adjustment and Retraining Notification Act ("WARN") in 1988 to provide employees, unions, and local governments with sixty days' advance notice of planned plant closing and mass layoffs. *See* 29 U.S.C. § 2102(a); 20 C.F.R. § 639.1(a) (App. 19a-21a). Although WARN does explicitly include a private right of action, it does not contain a statute of limitations. 29 U.S.C. § 2104(a)(5).

Peabody answered the complaint and raised the statute of limitations issue as an affirmative defense. Peabody then moved for summary judgment, arguing that the six-month limitations period for filing an unfair labor practice found in Section 10(b) of the NLRA, 29 U.S.C. § 160 (b), should apply to cases brought under WARN. The UMWA opposed, arguing that the applicable statute of limitations period was the most closely analogous state statute, in this case, the five-year "catch-all" limitations period found in Ky. Rev. Stat. § 413.120. On June 30, 1993, the District Court entered a summary order, without opinion, accepting Peabody's argument, granting summary judgment to Peabody, and dismissing the case.

On appeal, the Sixth Circuit Court of Appeals affirmed the District Court Order. It rejected the reasoning of two other Circuit Courts, both of which have found that analogous state statutes of limitations should apply in cases brought under WARN, rather than the six-month NLRA period. App. at 1a (citing *United Paperworkers International Union v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2nd Cir. 1993); *United Steel Workers of America, AFL-CIO, CLC v. Crown Cork & Seal Co. Inc.*, 32 F.3rd 53 (3rd Cir. 1994), *cert. granted sub nom. North Star Steel Co. v. Thomas*, 1995 U.S. LEXIS 84 (U.S. Jan. 6, 1995) (Nos. 94-834, 94-835). *See* App. 1a, 9a. Instead, the Court of Appeals chose to follow a panel

opinion by the Fifth Circuit in *Halkias v. General Dynamics*, 31 F.3d 224 (5th Cir. 1994), *scheduled for rehearing en banc*, 31 F.3d 248 (September 22, 1994). *See* App. 10a-11a. The panel failed to note that the *Halkias* panel had reconsidered its decision *sua sponte* five weeks earlier, and had set the case for rehearing before the Fifth Circuit *en banc* in January. The UMWA filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on December 14, 1994. (App. 16a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A CONFLICT WITH DECISIONS OF THE SECOND AND THIRD CIRCUITS, WHICH HAVE BOTH HELD THAT THE LIMITATIONS PERIOD TO APPLY IN WARN ACTIONS IS THE MOST ANALOGOUS STATE STATUTE OF LIMITATIONS.

The Sixth Circuit held that uniformity is highly desirable in WARN Act cases, that Section 10(b) of the NLRA provides "a much clearer analogy" to WARN cases than does any Kentucky limitations period, based on the " 'similarity of purpose' " between WARN and the NLRA, and that applying § 10(b) "significantly and directly advances the policies underlying WARN in a way that [the state statute] cannot." (App. 11a-13a).

As the court acknowledged, this holding directly conflicts with both the Second Circuit's decision in *United Paperkorkers International Union v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2d Cir. 1993), and the Third Circuit's decision in *Crown Cork & Seal Co.*, 32 F.3d 53. Both the Second and Third Circuit Courts of Appeals held that the WARN Act's underlying policies were best effectuated by applying the most closely analogous state statute of limitations. *Specialty Paperboard*, 999 F.2d at 55-57; *Crown Cork & Seal*, 32 F.3d at 58-60. The Sixth Circuit made no attempt to distinguish either case. Instead, it

expressly repudiated the conclusions of the Second and Third Circuits that WARN embodies a broader and more remedial purpose than the traditional labor union and collective bargaining relationships protected by the NLRA. *Specialty Paperboard,* 999 F.2d at 55 (WARN has only tangential effect on collective bargaining; comparison to NLRA is weak at best); *Crown Cork & Seal,* 32 F.3d at 58 (same; substantive protection of WARN intended to serve "very broad societal goals," whereas NLRA was intended to protect collective bargaining process and unionized workers).

This Court recently granted certiorari in *Crown Cork & Seal* and *North Star,* to resolve the identical issue presented by this case, to wit, whether to apply NLRA § 10 (b) or the most closely analogous state statute of limitations to actions brought under the WARN Act. 1995 U.S. LEXIS 84 (U.S. Jan. 6, 1995) (Nos. 94-834, 94-835). As noted above, the only Circuit in agreement with the Sixth Circuit on this question, the Fifth Circuit, is currently reconsidering the issue *en banc. Halkias,* 31 F.3d at 248 (5th Cir. 1994). Review should be granted in this case as well, to resolve the conflict among the circuits and provide uniformity of authority as to this substantial question.

II. THE DECISION BELOW RAISES AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW, AND DISTORTS THE ANALYTICAL FRAMEWORK ESTABLISHED BY THIS COURT FOR DECIDING WHETHER TO BORROW A STATE LIMITATIONS PERIOD.

The issue of what statute of limitations to apply where Congress has created a right of action, but failed to provide a limitations period in the statute itself, is an important and recurring one, and merits final resolution by this Court. Only four years ago, the Court reaffirmed the general rule that when "Congress has failed to provide a statute of limitations fof a federal cause of action, a court borrows or absorbs" the state limitations period most

analogous to the case at hand. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). *See also Reed v. United Transportation Union*, 488 U.S. 319, 323 (1989) (suits by members against labor unions governed by state statutes); *Wilson v. Garcia*, 471 U.S. 261 (1985) (federal civil rights claims; same); *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975) (federal employment discrimination claims; same).

In *Lampf*, the Court re-emphasized the continuing validity of the "presumption of state borrowing," and cautioned that it may not be lightly abandoned. *Lampf*, 501 U.S. at 355-57. It explicitly instructed lower courts to apply a "hierarchical inquiry" in determining which statute to borrow, beginning with consideration of the relevant state statute. *Id.* at 356-57. Although in *Lampf* itself the court ultimately selected a federal analogy, it stressed that federal borrowing should remain "a closely circumscribed exception," to be applied only where adoption of *any* state alternative would be "at odds" with and "frustrate the policies embraced by the federal enactment." *Id.*, at 356; *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987) (borrowing federal period for RICO cases); *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983) (borrowing § 10(b) for duty of fair representation cases).

Here, the decision of the Sixth Circuit veers sharply from these principles and establishes its own three-part test, to the detriment of the laid-off workers and their communities on whose behalf the WARN Act was enacted. Rather than first considering whether application of the most analogous state period would frustrate federal policy, the Sixth Circuit improperly examined at the outset whether national uniformity was desirable. Having found that it was,[1] the court then compounded its

[1] Contrary to the court's assumption, the need for national uniformity is no greater here than in any other situation involving

error by comparing the NLRA and the state statute side-by-side, rather than first evaluating the merits of applying the state statute and only then considering a federal alternative.[2] Finally, the court suggested that the Kentucky "catch-all" statute bore little resemblance to the WARN Act. This analysis misconstrued the order of the inquiry and improperly disregarded the presumption in favor of state borrowing.

As this Court has repeatedly cautioned, "the mere fact that state law fails to provide a perfect analogy to the federal cause of action is never itself sufficient to justify the use of a federal statute of limitations . . ." *Agency Holding*, 483 U.S. at 147; *accord*, *DelCostello*, 462 U.S. at 171. Although "there is not always an obvious state-law choice for application to a given federal cause of action . . . resort to state law remains the norm . . ." *Id.* As the court explained in *Wilson*, this is because the intent of the presumption is to "incorporate[] the State's judgment on the proper balance between" the competing policies of enforcement and finality. *Wilson v. Garcia*, 471 U.S. at 271.

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multistate employers and/or labor unions, since each plant closing, by definition, involves only a single site of employment. WARN, 29 U.S.C. § 2101. *Compare Reed v. United Transportation Union*, 488 U.S. 319 (1989) (borrowing state period for intra-union lawsuits); *Wilson v. Garcia*, 471 U.S. 261 (1985) (borrowing state personal injury period for civil rights claims); *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975) (borrowing state periods for employment discrimination claims).

[2] As noted above, both the Second and the Third Circuits reached the opposite conclusion on whether WARN and the NLRA are similar in purpose. In addition, the Sixth Circuit overlooked a critical distinction between the NLRA and WARN—namely, that the six-month statute of limitations was intended for an *administrative* forum, and to facilitate quick a dispute resolution in the interest of protecting the continuous exercise of employee rights in an ongoing workplace. By contrast, WARN claims are brought in federal court, and usually only after the employment relationship has been severed.

> [W]hen the federal claim differs from the state cause of action in fundamental respects, the State's choice of a particular specific period of limitation is, at best, only a rough approximation . . . [Many federal remedies] can have no precise counterpart in state law. . . . *Therefore, it is 'the purest coincidence,' when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect.*

Id. at 271-272 (internal citations and quotations omitted; emphasis supplied).

Thus, while it is true that Kentucky has not enacted its own version of the WARN Act, such a "perfect analogy" is not required. Parallel state statutes rarely, if ever, provide a perfect match to a federal cause of action, and, of course, different analogies for WARN will exist in any given state. The determinations of *which* state limitations period is the most analogous is often "somewhat arbitrary." *Id.* at 272 n.24. Instead, as recognized by the Second and Third Circuits, the rule is to apply "*the most closely analogous* statute of limitations period" unless doing so will frustrate federal policy. *DelCostello*, 462 U.S. at 158 (emphasis added); *Specialty Paperboard*, 999 F.2d at 53; *Crown Cork & Seal*, 32 F.3d at 57. Here, either the state catch-all provision, Ky. Rev. Stat. § 413.120 (five years), or the state breach-of-contract provision, Ky. Rev. Stat. § 413.090(2) (fifteen years), might be considered analogous to a cause of action for violating WARN, and either could properly be applied in this case.[3]

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[3] Catch-all periods such as Ky. Rev. Stat. § 413.120 have often been applied to employment-related actions in Kentucky, and to cases arising under WARN in other states. *See, e.g., Pike v. Baird Gate Co.*, 705 S.W.2d 947 (Ky. Ct. App. 1986) (wrongful discharge/workers' compensation claim); *Wholesale and Retail Food Distribution Local 63, et al. v. Santa Fe Terminal Services, Inc., et al.*, 826 F.Supp. 326 (C.D. Cal. 1993) (applying catch-all provision to WARN Act claim).

Finally, as the court cautioned in *Reed*, *DelCostello* does not require that § 10(b) be extended outside its traditional labor context to every employment relationship. State borrowing has been found appropriate for many employment-related claims, as exemplified by *Reed*, 488 U.S. at 330, and *Johnson v. Railway Express Agency*, 421 U.S. at 462. As in those cases, WARN's " 'tangential and remote' effects upon collective bargaining are insufficient to warrant departure from the general rule." *Crown Cork & Seal*, 38 F.3d at 58 (quoting *Reed*, 488 U.S. at 332). The Sixth Circuit's contrary conclusion distorts the analytical framework established in *DelCostello*, *Reed*, and *Lampf*, and directly conflicts with decisions of its sister Circuits.

CONCLUSION

This case presents a conflict between four Circuit Courts on a substantial, recurring issue of federal law, which is identical to the question that this Court has agreed to review in *North Star Steel*, No. 94-834, and *Crown Cork & Seal*, No. 94-835 (Jan. 6, 1995). In order to resolve the inter-Circuit conflict and for the reasons stated above, this petition should be granted as well.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-6020

UNITED MINE WORKERS OF AMERICA, AFL-CIO,
Plaintiff-Appellant,

v.

PEABODY COAL COMPANY,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Kentucky

Decided and Filed October 31, 1994

Before: KENNEDY, RYAN, and NORRIS, Circuit Judges.

RYAN, Circuit Judge. The plaintiff, United Mine Workers of America, appeals the district court's order dismissing on summary judgment the plaintiff's complaint that the defendant, Peabody Coal Company, violated the Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §§ 2101 *et seq.*, by closing a mining facility without providing employees with the statutorily mandated 60 days notice. Applying the six-month statute of limitations applicable to unfair labor practice charges under section 10(b) of the National Labor Relations Act

(NLRA), 29 U.S.C. § 160(b), the district court held that the plaintiff's claim was time-barred.

The sole question on appeal is whether the district court erred in borrowing the section 10(b) limitations period rather than the state statute of limitations identified by the plaintiff. We conclude that the district court did not err in borrowing the limitatiins period from section 10(b), and affirm the district court's order.

I.

The defendant operated a coal mining facility, the River Queen Mine, near Greenville, Kentucky. On June 3, 1991, the Kentucky Department of Natural Resources ordered the defendant to stop all blasting at the mine. The defendant obeyed the DNR's order and as a consequence, layoffs began June 5, 1991. By June 28, 1991, the defendant had laid off 82 mine employees.

Almost one year later, on May 15, 1992, the plaintiff filed suit in district court for the Western District of Kentucky, alleging that the defendant had violated WARN by failing to provide laid off employees with 60 days advance notice. The defendant filed a motion for summary judgment, claiming that the plaintiff's complaint was untimely under section 10(b) of the NLRA. In a summary order, the district court agreed that the claims were time-barred. This appeal followed.

II.

We review a district court's award of summary judgment *de novo*. *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988). The Federal Rules of Civil Procedure require that summary judgment,

> be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there

is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c).

III.

A.

The plaintiff argues that the district court should have applied Kentucky's five-year limitations period for "[a]n action upon a liability created by statute," Ky. Rev. Stat. Ann. § 413.120 rather than section 10(b). According to the plaintiff, it is well settled that the court must borrow from state law when Congress, in creating a cause of action, has failed to identify a limitations period. Only when a federal limitations period both provides the closer analogy and directly implicates important federal policy are courts authorized to depart from the state-borrowing rule. WARN, the plaintiff argues, implicates neither of the federal policies—workforce stability and protection of the integrity of collective bargaining—that section 10(b) was designated to promote.

Nor, acording to the plaintiff, is the NLRA a proper analogy to WARN. The plaintiff claims that section 10(b) contemplates an administrative process that requires minimal effort by an aggrieved employee, whereas an employee can pursue his rights under WARN only through the judicial process. Based on the need to retain counsel alone, the plaintiff maintains that the court should reject the relatively short section 10(b) limitations period.

Several labor organizations and the NLG/Sugar Law Center for Economic and Social Justice, in *amicus curiae*,[1] offer the additional argument that a short limitations pe-

[1] Those labor organizations joining in *amicus curiae* were the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America; the Oil, Chemical and Atomic Workers International Union; the Automobile Mechanics Local 701; and the International Association of Machinists.

riod is incompatible with class-action litigation, which WARN encourages.

In response, the defendant, and the United States Chamber of Commerce in *amicus curiae*, argue that section 10(b) both furnishes the most analogous limitations period and far better serves the federal policies implicated by WARN, than does reference to state law.

The defendant claims that federal law provides the better analogy because claims arising under WARN are inherently uniform and uniquely federal, warranting a uniform statute of limitations. According to the defendant, section 10(b) provides the obvious choice for this uniform standard because of similarities between the NLRA and WARN. In contrast, the defendant contends, Kentucky law contains no cause of action analogous to WARN, leaving a catchall limitations period as the only state law choice.

In arguing that section 10(b) far better effectuates the federal policies underlying WARN, the defendant contends that the policies implicated by both WARN and section 10(b) are the expeditious resolution of labor disputes and uniformity throughout federal labor legislation. According to the defendant, WARN's purpose, immediate retraining and adjustment, and the limited nature of the WARN remedy, 60 days pay, both demonstrate that Congress intended these claims to receive speedy handling. As to the need for uniformity, the defendant argues that, because a single decision by an employer often creates WARN liability in several states, a uniform limitations period is needed to prevent forum shopping.

B.

WARN requires large employers to provide 60-days advance notice of plant closings or mass layoffs. 29 U.S.C. § 2102(a). Absent extenuating circumstances, notice must be given "to each representative of the affected employees . . . or, if there is no such representative at that time, to each affected employee," as well as to

designated state and municipal representatives. *Id.* WARN further provides that an employer that violates these strictures will be liable to each affected employee for back pay and benefits for up to 60 days, the length of the required notice. 29 U.S.C. § 2104(a)(1). The employer may also be liable to the municipality in which the layoff occurred, at a maximum penalty of $500 per day. 29 U.S.C. § 2104(a)(3). Affected employees or their representative, or the impacted municipality, may enforce these penalties by bringing suit "in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business." 29 U.S.C. § 2104(a)(5).

While neither WARN itself nor its limited legislative history articulate the purpose of the legislation, federal regulations define WARN's purpose as follows:

> (a) *Purpose of WARN.* The Worker Adjustment and Retraining Notification Act . . . provides protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. WARN also provides for notice to State dislocated worker units so that dislocated worker assistance can be promptly provided.

20 C.F.R. § 639.1.

WARN cross-references the NLRA in several respects. For example, WARN incorporates the NLRA's definition of "exclusive representative." 29 U.S.C. § 210(a)(4). In addition, WARN clarifies that its notice requirements do not apply when employees lose active employment

status, in conformity with the NLRA, because of their participation in an economic strike. 29 U.S.C. § 2103(2). While not specifically referencing the NLRA, WARN accommodates collectively bargained contract provisions by specifying that the WARN notice period "shall run concurrently with any period of notification required by contract." 29 U.S.C. § 2105. WARN regulations provide further insight, observing that "[c]ollective bargaining agreements may be used to clarify or amplify the terms and conditions of WARN, but may not reduce WARN rights." 20 C.F.R. § 639.1(g). Finally, in order to avoid unfair labor practice allegations that an employer failed to bargain, WARN specifies that "[t]he giving of notice pursuant to this chapter, if done in good faith compliance with this chapter, shall not constitute a violation of the National Labor Relations Act or the Railway Labor Act." 29 U.S.C. § 2108. Given this interrelationship, it is not surprising that we previously have relied on NLRA case law in interpreting WARN. *See Damron v. Rob Fork Mining Corp.*, 945 F.2d 121, 124-25 (6th Cir. 1991).

As the plaintiff points out, however, the courts have expressed a preference for state statutes of limitations when Congress, in creating a cause of action, has failed to designate a limitations period. As a general rule, the court's "task is to 'borrow' the most suitable statute or other rule of timeliness from some other source." *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 158 (1983). Usually, the other source will be "the most closely analogous statute of limitations under state law." *Id.* This "fallback rule . . . rests on the assumption that, absent some sound reason to do otherwise, Congress would likely intend that the courts follow their previous practice of borrowing state provisions." *Id.* at n. 12.

The *DelCostello* Court cautioned, however, that state borrowing is not always the proper course:

> In some circumstances, . . . state statutes of limitations can be unsatisfactory vehicles for the enforce-

> ment of federal law. In those instances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law.

Id. at 161. The requisite circumstances exist, the Court declared, "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and . . . the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." *Id.* at 172.

The *DelCostello* Court was faced with just such a situation in the case of an employee's hybrid claim that his employer violated section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, at the same time his union violated its duty of fair representation. According to the Court, the six-month limitations period of section 10(b), enacted to govern unfair labor practices under the NLRA, provided a closer analogy than the suggested state law statutes because fair representation claims bear at least a "family resemblance" to union-directed unfair labor practice claims. 462 U.S. at 170. In addition, section 10(b) significantly and directly advanced the dueling federal policies at issue:

> "In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in this case."

Id. at 171 (quoting *United Parcel Serv., Inc. v. Mitchell,* 451 U.S. 56, 70-71 (1981)).

Following *DelCostello*, the Supreme Court provided insight into the procedure for determing the applicable

limitations period, this time in the context of civil claims brought under the Racketeer Influenced and Corrupt Organizations Act, 18 US.C. § 1964:

> [T]he initial inquiry is whether all claims arising out of the federal statute "should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case." Once this characterization is made, the next inquiry is whether a federal or state statute of limitations should be used.

Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 147 (1987) (citation omitted) In response to the first inquiry, the Court concluded that "a uniform statute of limitations [was] required to avoid intolerable 'uncertainty and time-consuming litigation.'" *Id.* at 150 (citation omitted). This uncertainty arose, necessarily, because of the multitude of limitations periods that arguably could be applicable, given RICO's breadth. "RICO cases commonly involve interstate transactions, and conceivably the statute of limitations of several States could govern any given RICO claim." *Id.* at 153. As a result, "the use of state statutes would present the danger of forum shopping and, at the very least, would 'virtually guarante[e] . . . complex and expensive litigation over what should be a straightforward matter.'" *Id.* at 154 (citation omitted). Moreover, because of uncertainty over which limitations period a court ultimately would adopt, "'[p]laintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute.'" *Id.* at 150 (citation omitted).

Against this background, we recently expanded section 10(b) to cover claims that the union illegally accepted something of value from the employer, in violation of section 302 of the Labor Management Relations Act, 29 U.S.C. § 186. *Holmes v. Donovan*, 984 F.2d 732 (6th Cir 1993) As noted there, section 302(a) prohibits con-

duct that also is prohibited by the unfair labor practice provisions of the NLRA, specifically section 8(b)(6), 29 U.S.C. § 158(b)(6). Primarily because of "this similarity of purpose," we extended the section 10(b) limitations period to LMRA section 302. *Id.* at 736-37.

The plaintiff primarily relies on the Second Circuit's recent rejection of section 10(b) as " 'a significantly more appropriate vehicle for interstitial lawmaking' " in WARN actions. *United Paperworkers Int'l Union v. Specialty Paperboard, Inc.*, 999 F.2d 51, 53 (2d Cir. 1993) (citation omitted). The *Specialty Paperboard* decision turned largely on that court's assessment that there was no need for a uniform federal limitations period: "Although suits may be brought either where the [layoff or plant closing] site is located or where the employer does business, 29 U.S.C. § 2104(a)(5), the advantages of forum shopping are minimal." *Id.* at 56. The court further explained that choice of law rules probably would require " 'borrowing the law of the site since that would be the place of the injury' " *Id.* at n.9 (citation omitted).

On this basis, the *Specialty Paperboard* court concluded that Vermont's limitations period governing contract actions "best approximate[d] the federal legislative intent" in enacting WARN. *Id.* at 57. Key to its conclusion was the state's application of this limitations period to suits for workers' compensation benefits. *Id.* The court expressly declined to characterize WARN actions themselves as contractual in nature. *Id.* Similarly, the Third Circuit, the only other appellate court to have addressed the issue, has rejected the section 10(b) limitations provision in favor of the "most analogous" state statute of limitations, without indicating which of several Pennsylvania limitations statutes would apply. *United Steel Workers of America, AFL-CIO-CLC v. Crown Cork & Seal Co., Inc.*, 32 F.3d 53 (1994).

Other courts to consider the question of which limitations period governs WARN actions have reached differing

results. In *Wallace v. Detroit Coke Corp.*, 818 F. Supp. 192 (E.D. Mich. 1993), the district court agreed that the state limitations provision applicable to contract actions provided the closest analogy, but used a rationale entirely different than that offered in *Specialty Paperboard*:

> The type of interest harmed in [WARN] suits is contractual. When an employer unilaterally and radically changes an employee's terms of employment without notice and the employee is suddenly discharged from employment, he essentially is breaching that worker's employment contract.

Id. at 196.

Several district courts have agreed with the district court here that section 10(b) provides the superior analogy in WARN actions. Typical of these decisions is *Newspaper & Mail Deliverers' Union of New York v. United Magazine Co.*, 809 F. Supp. 185 (E.D.N.Y. 1992). There, the court found that the limited remedy available under WARN evinced a policy that was better served by section 10(b)'s relatively short statutory period. Relying on the Ninth Circuit's interpretation of the Trade Act of 1974, 19 U.S.C. §§ 2101 *et seq.*, which had a purpose similar to WARN, the *United Magazine* court observed,

> "[i]n order to serve the Act's purposes of retraining, adjustment, and relocation, it was important that workers claim and receive benefits promptly after discharge . . . Thus, when workers fail to apply timely for benefits and are so not eligible, it is not that they are being penalized for failure to file; rather they simply are so [sic] longer within the category Congress intended to aid by this program."

Id. at 192 (quoting *Lloyd v. United States Dep't of Labor*, 637 F.2d 1267, 1270-71 (9th Cir. 1980)).

Similarly, in *Halkias v. General Dynamics Corp.*, 825 F. Supp. 123 (N.D. Tex. 1993), *aff'd*, No. 93-1664,

1994 WL 456673 (5th Cir. Aug. 24, 1994), the court emphasized the need for a short uniform statutory period in order to effectuate the limited purpose of WARN. In addition, contrary to the suggestion in *Specialty Paperboard* that forum shopping will not be a problem in WARN actions, the *Halkias* court observed, "The uniformity consideration is particularly persuasive in this action in light of the fact that the lay-offs . . . affected employees in Texas, Oklahoma, and Missouri." *Id.* at 125.

C.

Based on the foregoing, we conclude that the district court did not err in applying the six-month limitations period of section 10(b). As the *DelCostello* line of cases teach, three inquiries are relevant in determining whether federal law should displace the norm of borrowing from state law. First, is uniformity desirable? Second, does federal law provide a much clearer analogy than state law? Third, does federal law significantly and directly advance the policy underlying the statute in a way that state law does not? Here, the answer to each question is affirmative.

First, uniformity is highly desirable. Both the plaintiff and the Second Circuit downplay the multi-state nature of decisions that implicate WARN, and thus the potential for forum shopping and related anomalies arising from differing statutes of limitations in several states in which a single employer does business. First, as evidenced by *Halkias,* a single decision can result in plant closings in several states, any one of which could provide the forum for suit. The state in which the closing decision was made can provide yet another forum. Second, the company that closes several plants in several states can be sued in those several states and thus be subject to several different statutes of limitations for the same, single federal violation. Third, the parties and the courts could face potentially

daunting choice of law problems arising from claims brought in several different states as a result of forum shopping. Finally, given the authorization in WARN to bring suit in any federal district "in which the employer transacts business," 29 U.S.C. § 2104(a)(5), including districts other than where a plant is closed or the plant closing decision was made, the opportunity for forum shopping in today's national and international corporate environment appears limitless.

Uniformity is desirable for a more important reason, however, exemplified by the different courts' inconsistent analyses. The suggestions of possibly analogous limitations periods run the gamut from the catchall limitations period advocated here to those governing contracts or torts. Even the *Specialty Paperboard* and *Wallace* courts, which agreed that state contract limitations periods should apply, did so for divergent reasons. Add to these limitations periods, arguments that can be raised under state unemployment laws, state wage laws, state benefit laws, state plant closing laws, and the opportunities are endless. Thus, selecting a WARN limitations period implicates the same concerns for uniformity present in *Agency Holding Corp.*

As to the second inquiry, there can be no doubt that section 10(b) provides a closer analogy than the state law advocated here, which in essence provides no analogy. The plaintiff offers a catchall limitations period applicable to any statutory claim that does not contain an express limitations provision. The only commonality between WARN and the proffered state statute is that both are pieces of legislation. Section 10(b), on the other hand, governs unfair labor practice claims arising out of an employer's failure to notify and bargain with the union over plant closings or layoffs. *See* 29 U.S.C. § 158(a)(5). Thus, despite admitted differences between WARN and the NLRA, both are designed to afford protection against job loss—a safeguard that goes to the heart of the employment relationship. As we noted in *Holmes,* "this sim-

ilarity of purpose" provides the analogy necessary to extend section 10(b) outside the parameters of the NLRA. 984 F.2d at 737.

There are other similarities between WARN and the NLRA. For example, the NLRA defines as one of its purposes the proscription of management practices "which affect commerce and are inimical to the general welfare." 29 U.S.C. § 141(b). Such an objective is consistent with WARN's aim of protecting not only workers, but their community as well. 20 C.F.R. § 639.1(a). The references in WARN to the NLRA further demonstrate that section 10(b) provides a far closer analogy to WARN than does a residual state limitations statute.

The plaintiff's arguments to the contrary are unconvincing. The need to retain counsel can hardly be reason to reject section 10(b), given that employees bringing hybrid claims—which *DelCostello* expressly subjected to section 10(b)—have a similar need to hire counsel. Moreover, most of the complexities attendant to class action litigation, such as notice and certification, do not come into play until the lawsuit has been filed, and thus have minimal, if any, impact on the limitations issue.

Finally, the six-month limitations period of section 10(b) significantly and directly advances the policies underlying WARN in a way that a five-year catchall provision cannot. By implementing a 60-day notice requirement, Congress clearly intended to provide short-term relief not only to affected employees, but to their communities and supporting state agencies as well. This purpose of bridging what would otherwise be a drain on resources would be defeated if not rapidly implemented. A prolonged statute of limitations would do nothing to achieve WARN's aim of starting employees on the road to retraining and reemployment before unemployment becomes a problem.

IV.

For the foregoing reasons, we find that section 10(b) of the NLRA provides the more analogous limitations provision and better effectuates the policies underlying WARN than does Kentucky's residual limitations period. Accordingly, we AFFIRM the district court's order dismissing the plaintiff's claim as untimely.

APPENDIX B

[Entered Jun. 30, 1993]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

Civil Action No. 92-0073-0(CS)

UNITED MINE WORKERS OF AMERICA
INTERNATIONAL UNION,
Plaintiff

v.

PEABODY COAL COMPANY,
Defendant

ORDER

Defendant, Peabody Coal Company, having moved for summary judgment, and the Court having considered the motion and the memoranda and arguments of the parties, and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that defendant's motion for summary judgment is granted, the Court finding that plaintiff's claims are barred by the six month statute of limitations applicable to WARN Act cases.

IT IS HEREBY FURTHER ORDERED that this action is dismissed with prejudice.

/s/ [Illegible]
Judge
United States District Court

Date: June 30, 1993

APPENDIX C

[Filed Dec. 14, 1994]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-6020

UNITED MINE WORKERS OF AMERICA, AFL-CIO,
Plaintiff-Appellant,

v.

PEABODY COAL COMPANY,
Defendant-Appellee.

ORDER

BEFORE: KENNEDY, RYAN, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN,
Clerk

APPENDIX D

NATIONAL LABOR RELATIONS ACT

§ 160. Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior

to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

APPENDIX E

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

§ 2102. Notice required before plant closings and mass layoffs

(a) Notice to employees, State dislocated worker units, and local governments

An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State dislocated worker unit (designated or created under title III of the Job Training Partnership Act [29 U.S.C. 1651 et seq.]) and the chief elected official of the unit of local government within which such closing or layoff is to occur.

If there is more than one such unit, the unit of local government which the employer shall notify is the unit of local government to which the employer pays the highest taxes for the year preceding the year for which the determination is made.

* * * *

§ 2104. Administration and enforcement of requirements

(a) Civil actions against employers.—(1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—

(A) back pay for each day of violation at a rate of compensation not less than the higher of—

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; and

(B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

* * * *

(5) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

(6) In any such suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

(7) For purposes of this subsection the term, "aggrieved employee" means an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with section 2102 of this title, did not receive timely notice either directly or through his or her representative as required by section 2102 of this title.

(b) Exclusivity of remedies.—The remedies provided for in this section shall be the exclusive remedies for any

violation of this chapter. Under this chapter, a Federal court shall not have authority to enjoin a plant closing or mass layoff.

(Pub.L. 100-379, § 5, Aug. 4, 1988, 102 Stat. 893.)

Supreme Court, U.S.
FILED
MAR 16 1995
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No. 94-1398

In The

Supreme Court of the United States

October Term, 1994

UNITED MINE WORKERS OF AMERICA, AFL-CIO,
an unincorporated association,

Petitioner,

v.

PEABODY COAL COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Circuit Court of Appeals erred in borrowing the National Labor Relations Act six-month limitations period for application in this case brought under the Worker Adjustment and Retraining Notification Act, when the Sixth Circuit found that the considerations set forth in *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983) and its progeny all counseled in favor of borrowing the NLRA limitations period.

RULE 29.1 STATEMENT

Respondent, Peabody Coal Company, is an indirect wholly-owned subsidiary of Peabody Holding Company, Inc. Peabody Holding Company, Inc. is an indirect wholly-owned subsidiary of Hanson PLC.

No. 94-1398

In The

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UNITED MINE WORKERS OF AMERICA, AFL-CIO,
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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent would like to supplement Petitioner's statement of the case with one matter relevant to the employment terminations giving rise to this WARN Act case.

As recognized by the court below, the Kentucky Department of Natural Resources, on June 3, 1991, ordered Respondent to stop all blasting at its River Queen Mine. *See* Sixth Circuit Opinion, Petitioner's Appendix 2a. As there was no other way Respondent could mine the remaining coal at the River Queen Mine,

Respondent could not effectively mine any more coal. Accordingly, there was very little work left to be done by the miners at the River Queen Mine.

In circumstances such as those facing Respondent on June 5, 1991, the WARN Act allows the employer to give less than 60 days notice. *See* 29 U.S.C. § 2102(b)(2)(A) (allowing less than sixty days notice when the employment loss is caused by business circumstances that were not reasonably foreseeable as of the time notice would have been required). The notice given to the employees represented by Petitioner on June 5, 1991, was as much notice as was practical for Respondent to give to the employees in the circumstances in which Respondent found itself. In addition, consistent with 29 U.S.C. § 2102(b)(3), the notice given on June 5, 1991, stated that the notice was being given pursuant to the WARN Act and explained to the employees why they were receiving less than 60 days notice.

ARGUMENT

This Court already has granted certiorari on the issue of what limitations period should apply in WARN Act cases in *Thomas v. North Star Steel Co.*, 32 F.3d 53 (3d Cir. 1994), *cert. granted*, 63 U.S.L.W. 3514 (U.S. Jan. 6, 1995) (No. 94-834) and *United Steel Workers of America, AFL-CIO-CLC v. Crown Cork & Seal Co.*, 32 F.3d 53 (3d Cir. 1994), *cert. granted*, 63 U.S.L.W. 3514 (U.S. Jan. 6, 1995) (No. 94-835). Petitioners' briefs have been filed in both cases, and those cases (which have been consolidated) are scheduled to be argued on April 25, 1995. Thus, to the

extent that this Court needs to decide what limitations period should apply in WARN Act cases, this Court will do so in the *North Star Steel* and *Crown Cork & Seal* cases.

Because those cases will be decided this term, granting certiorari in this case would be futile. This case cannot be briefed and argued this term. By the time this case would be argued next term, the *North Star Steel* and *Crown Cork & Seal* cases will be decided. Obviously, no useful purpose would be served by granting certiorari in a case which cannot be argued until next term, when the sole reviewable issue in the case will be resolved by this Court this term.

Respondent firmly believes that the Sixth Circuit was correct when it decided that federal courts should borrow the six-month limitations period contained in the NLRA for application in WARN Act cases. Respondent would welcome the opportunity to explain to this Court why *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983), and its progeny call for the exact result reached by the Sixth Circuit in this case.

But this Court will hear that explanation in the two cases scheduled for argument on April 25, 1995. As granting certiorari in this case would not assist the Court in its resolution of that issue in any material respect, Respondent asks that the petition for certiorari be denied.

CONCLUSION

As this Court has before it this term two cases in which this Court will decide what limitations period

federal courts should apply in WARN Act cases, no useful purpose would be served by granting certiorari in this case. Accordingly, Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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